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No. 80-.....

IN THE

Supreme Court of the United States

October Term, 1980

THE GREAT ATLANTIC & PACIFIC TEA CO.,
Petitioner

v.

GILBERT EWALD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals err upon remand when it read certain dictum footnotes in this Court's decision in *Mohasco Corp. v. Silver* as requiring it to reject its earlier construction of the unique structure, policy and legislative history of the ADEA, and hold that ADEA claimants residing in states with state age discrimination laws are, merely by virtue of their state residency, automatically entitled to the extended federal filing period of ADEA Section 626(d)(2), even if they fail to timely initiate state proceedings and fail to initiate federal proceedings within the 180-day period provided by §626(d)(1) of the ADEA?

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OPINIONS BELOW

On remand from this Court, the Court of Appeals for the Sixth Circuit issued two per curiam orders, both not yet officially reported. The January 6, 1981 order appears as Appendix D hereto. The February 5, 1981 rehearing order appears as Appendix E. The original opinion of the Sixth Circuit on the question presented here is reported at 620 F.2d 1183 (6th Cir. 1980), and is included as Appendix B to this petition. The opinion of the United States District Court for the Eastern District of Michigan, not reported, appears in Appendix A.

JURISDICTION

On remand from this Court, the Court of Appeals for the Sixth Circuit entered judgment in this case on January 6, 1981. The Court of Appeals denied A & P's petition for rehearing by order dated February 5, 1981. This petition for certiorari was filed within 90 days of the filing of the order denying rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 *et seq.* (hereinafter referred to as ADEA), will be generally referred to and the specific sections of that act which will be called upon for interpretation and application are as follows:
29 U.S.C. §626(d) provides:

> "(d) No civil action may be commenced by any individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred; or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. §633(b) provides:

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under Section 626 of this title before the expiration of 60 days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated . . . ."

STATEMENT OF THE CASE

1. Facts

Respondent, Gilbert Ewald, was employed by Petitioner, the Great Atlantic & Pacific Tea Co.[1] ("A & P"), until his termination on April 21, 1975. Ewald's age at the time of his termination was 41 years, 8 months.

On January 26, 1976 (280 days after his termination) Ewald gave notice to the Department of Labor of his intention to challenge his termination by bringing suit under the ADEA. By letter dated March 25, 1976 (339 days after his termination) Ewald filed a complaint under the Michigan Fair Employment Practices Act, Mich. Comp. Laws §423.301 *et. seq.,* alleging that his termination constituted illegal age discrimination.

Ewald subsequently commenced this action in the United States District Court for the Eastern District of Michigan, Northern Division, alleging that his termination of employment was because of age in violation of the ADEA.

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1. STATEMENT REQUIRED BY RULE 28.1

Fifty point three per cent (50.3%) of the outstanding common stock of The Great Atlantic & Pacific Tea Company, Inc. is owned by Tengelmann Warenhandelsgessellschaft a partnership organized under the laws of the Federal Republic of Germany ("Tengelmann") which in turn is controlled by Mr. Erivan Haub. Affiliates of Tengelmann include Plus Warenhandelsegssellschaft mbh & Co. oHG, Wilhelm Schmitz-Scholl, and LOWA Warenhandelsgesellschaft mbH.

2. Procedural History

On May 5, 1977, A & P moved to dismiss Ewald's claims on grounds of untimeliness. Specifically, A & P argued that Ewald was not entitled to the extended 300-day federal filing period of Section 626(d)(2) because he had not filed his state claim within 180 days after the alleged act of discrimination, as required by Section 626(d)(1). On July 27, 1977, the District Court granted A & P's motion and dismissed the case.[2]

On appeal, the Court of Appeals for the Sixth Circuit affirmed the judgment of the district court, holding that ADEA claimants in dual-law[3] states were not entitled to the extended federal filing period unless they had filed a state claim within the initial 180-day period. The Court of Appeals based its interpretation of the ADEA filing requirements on several considerations arising from the structure and purpose of the ADEA.[4]

The interpretation originally adopted by the Court of Appeals in this case also prevailed in the Courts of Appeals for the First[5] and Third[6] Circuits. Like the ori-

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2. *Ewald v. Great Atlantic & Pacific Tea Co.*, No. 76-10080 (E.D. Mich. 1977) (Appendix A).

3. A "dual-law" state is one which has a state law prohibiting age discrimination in employment. The analogous term under Title VII is "deferral" state. Since the ADEA has no deferral requirement, however, it is both misleading and erroneous to use the deferral/non-deferral terminology in the ADEA context. Accordingly, this Petition will substitute the more accurate terms: "dual-law" state and "federal-law-only" state.

4. *Ewald v. Great Atlantic & Pacific Tea Co.*, 620 F.2d 1183 (6th Cir. 1980) (Appendix B).

5. *Ciccone v. Textron, Inc.*, 616 F.2d 1216 (1st Cir. 1980).

6. *Davis v. Calgon Corp.*, —— F.2d ——, 22 BNA FEP Cases 1761 (3d Cir. 1980).

ginal decision here, the First and Third Circuit opinions were based on considered analyses of the structure, policy and/or legislative history of the ADEA.

On June 23, 1980—approximately six weeks after the original Sixth Circuit decision in this case—this Court issued a decision in *Mohasco Corp. v. Silver,* 447 U.S. —, 100 S. Ct. 2486 (1980). *Mohasco* was a Title VII, not an ADEA, case. Moreover, the facts in *Mohasco,* as discussed *infra,* did not present the same timeliness issue involved here, even as that issue might arise under Title VII.[7] In dicta, however, this Court made certain footnote comments that seemed pertinent to the timeliness question presented in this case. 100 S. Ct. at 2490-92, nn. 16 & 19.

On August 1, 1980, Ewald filed a petition for a writ of certiorari to review the original decision of the Court of Appeals. On October 20, 1980, this Court vacated the judgment of the Court of Appeals and remanded the cause "for further consideration in light of *Mohasco Corp. v. Silver* . . ."[8]

Without the benefit of briefs or argument by the parties, on January 6, 1981 the Court of Appeals abandoned its earlier construction of the ADEA filing requirement, on the sole ground that that interpretation

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7. Unlike the present case, in *Mohasco,* the plaintiff had made a timely state filing. *Mohasco Corp. v. Silver,* 447 U.S. ——, 100 S. Ct. 2486, 2489 n.4 (1980). Beyond this, in *Mohasco,* the plaintiff had failed to "file" his federal charge within the extended 300-day period—even assuming the extended 300-day period were applicable.

8. *Ewald v. Great Atlantic & Pacific Tea Co.,* 49 U.S.L.W. 3282 (Oct. 20, 1980) (Appendix C).

was "inconsistent with the language in . . . the Supreme Court's opinion in *Mohasco Corp. v. Silver* . . . ."[9] The January 6th order contained no explanation whatsoever as to why the court's earlier position, which was based on a thorough analysis of the structure and policy of the ADEA, was suddenly superseded solely by dictum statements contained in footnotes from a decision construing another statute.

On January 16, 1981, A & P petitioned for rehearing of the court's decision on remand. A primary reason asserted for rehearing was this Court's post-*Mohasco* decision in *Delaware State College v. Ricks,* — U.S. —, 101 S. Ct. 498 (1980), which had not been considered in the remand decision of the Court of Appeals. Certain statements in *Ricks* indicated that this Court did not intend the broad reading of *Mohasco* upon which the Court of Appeals had based its decision on remand.

In an order dated February 5, 1981,[10] the Court of Appeals conceded that *Ricks* "appears to contradict some of the language in *Mohasco* . . . ." Nonetheless, the court denied A & P's petition for rehearing, apparently because the court felt bound by this Court's dictum footnotes in *Mohasco.* Presumably for the same reason, the court again did not explain why the structure, policy and legislative history of the ADEA were no longer relevant to a determination of this issue.

A & P now submits this petition, urging this Court to review the orders of the Court of Appeals on remand.

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9. *Ewald v. Great Atlantic & Pacific Tea Co.,* No. 77-1600, (6th Cir. Jan. 6, 1981) (Appendix D).

10. *Ewald v. Great Atlantic & Pacific Tea Co.,* No. 77-1600, (6th Cir. Feb. 5, 1981) (Appendix E).

REASONS FOR GRANTING THE WRIT

1. The treatment of this case by the Court of Appeals does not reflect the full reconsideration of the issue presented here as intended by this Court's remand order of October 20, 1980.

On October 20, 1980, this Court remanded this case, and another presenting the same issue,[11] to the respective courts of appeals "for further consideration in light of *Mohasco Corp. v. Silver.*"[12] Presumably, by the remand order, this Court intended that the Court of Appeals analyze the similarities and differences between the Title VII and ADEA filing requirements; analyze the similarities and differences between the factual settings presented by *Mohasco* and this case; and ultimately decide whether the initial decision of the Court of Appeals should stand, be modified, or be reversed.

Without the benefit of briefs or argument on these issues, and without explanation or discussion, the Court of Appeals summarily reversed its initial decision solely by reference to certain dictum footnote comments of this Court in *Mohasco.*

This action of the Court of Appeals is especially troublesome, given the court's earlier decision on this issue. That opinion was based on several factors arising from the structure and policy of the ADEA. For example, the court reasoned that the underlying purpose of the extended filing period—"to give the state an opportunity to conciliate the dispute"—would not be served

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11. *Ciccone v. Textron, Inc.,* 49 U.S.L.W. 3282 (Oct. 20, 1980).

12. *Ewald v. Great Atlantic & Pacific Tea Co.,* 49 U.S.L.W. 3282 (Oct. 20, 1980) (Appendix C).

if claimants were not required to file promptly with state discrimination agencies. The court was also concerned about the unfairness, inequality, and irrationality that would result from allowing claimants in dual-law states 300 days in which to file, but requiring those in federal-law-only states to file within 180 days. Finally, the court found support for its interpretation in this Court's only ADEA decision, *Oscar Mayer v. Evans,* 441 U.S. 750 (1979), and in the ADEA's statutory purpose of protecting employers from stale claims.

There exists nothing in this Court's *Mohasco* decision, in the footnotes or otherwise, to vitiate any of the factors originally relied upon by the Circuit Court in its initial decision in this case. Yet, in its remand orders, the Court of Appeals did not even mention the various considerations that had supported its earlier decision. Nor did the Court of Appeals consider the legislative history of the ADEA, which A & P had asserted in its petition for rehearing. Instead, the court merely referred to the *Mohasco* footnotes. Presumably, the court felt no need to explain why the question presented here should be controlled solely by dictum footnotes in a Title VII case, even though, by the court's own admission, the structure and policy of the ADEA compelled a different result.

Petitioner respectfully submits that the Sixth Circuit's treatment of this case on remand has produced a highly unsatisfactory resolution of the issue involved here. The extreme importance of this issue in the administration of the ADEA requires that the issue be resolved only by a complete analysis of *all* the factors involved. The court of appeals decision here, however, ignores these most important considerations, especially

those arising from the structure, policy and legislative history of the ADEA.

2. This Court should intervene to correct the lower court's expansive interpretation of *Mohasco Corp. v. Silver* and to clarify the continuing confusion in this area of the law.

On remand, the Court of Appeals for the Sixth Circuit decided this case solely on the basis of dictum contained in certain footnotes in *Mohasco Corp. v. Silver,* 447 U.S. —, 100 S. Ct. 2486 (1980). In so doing, the Court of Appeals severely overestimated the impact of *Mohasco* on the resolution of this issue.

Mohasco was not an ADEA case at all; it was a Title VII case which presented the narrow question of the Congressional intent underlying the word "filed" as that word appeared in two different subsections of §706 of Title VII, 42 U.S.C. §2000e-5.[13]

It is true that there are similarities between the Title VII and ADEA charge or notice filing provisions. There are also, however, marked differences in these provisions—differences which have been specifically recognized by an earlier decision of this Court and which are critical to the disposition of the present case. As this Court noted in *Oscar Mayer,*[14] Title VII's statutory scheme mandates sequential filing of state and federal charges and requires an initial 60-day period of exclusive state jurisdiction. Title VII charges lodged initially with the EEOC must be "deferred" to the state deferral agency, if one exists. The ADEA, on the other hand,

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13. *Mohasco v. Silver,* 48 U.S.L.W. at 4851.
14. 441 U.S. at 756.

provides for no period of exclusive state jurisdiction, but rather permits concurrent state and federal administrative jurisdiction. There is no "deferral" provision or requirement under the ADEA.

The rationale of this Court's decision in *Mohasco*—ordinarily requiring a filing of state charges in Title VII deferral states within 240 days of the event complained of—is entirely premised upon this Title VII 60-day period of exclusive state jurisdiction. In short, the reasoning of this Court was that a Title VII deferral state complainant must file state charges within 240 days inasmuch as delay beyond this 240-day period would render it impossible for the complainant to meet Title VII's requirement of a 60-day period of exclusive state jurisdiction while, at the same time, meeting the extended 300-day federal filing period applicable in Title VII deferral state situations.[15]

Obviously, inasmuch as the ADEA contains no period of exclusive state jurisdiction over, and no requirement of deferral of, complaints of age discrimination, the logic of the Court's *Mohasco* decision has no application under the ADEA. Stated differently, the 240-day period which figures so prominently in the Court's decision in *Mohasco* has no relevance or application at all under the ADEA.[16]

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15. The only exception to this 240 day filing period would occur if a claimant filed beyond the 240 day period and the state or local agency happened to complete its processing of the charge within the 60 days remaining until the expiration of the extended 300 day period. *Mohasco v. Silver,* 48 U.S.L.W. at 4852-4853 n.16.

16. It should be noted that even if one were to wrongly, and mechanically, apply the 240 day period established in *Mohasco* to an ADEA action, Petitioner

If there existed any doubt regarding the limited significance of the *Mohasco* case in an ADEA setting, that doubt should have been resolved by the subsequent decision of this Court in another Title VII case, *Delaware State College v. Ricks,* — U.S. —, 101 S. Ct. 498 (1980). In *Ricks,* this Court indicated that the timeliness question presented here has *not* been resolved by *Mohasco,* even under Title VII.

Ricks, which was decided after *Mohasco,* involved a determination of the date of the "discriminatory practice," for purposes of measuring compliance with the Title VII filing requirements. Several statements in the majority and dissenting opinions bear on the issue presented here. Justice Powell's majority opinion (joined in by Chief Justice Burger and Justices White, Blackmun and Rehnquist) discusses the EEOC's argument that, because the state involved was a deferral state, the complainant was entitled to 300 days in which to file his EEOC claim. Noting that this issue was mooted by the Court's resolution of other issues in the case, Justice Powell wrote, "we *need not decide* whether [the complainant] was entitled to 300 days to file his complaint." 101 S. Ct. at 505 n.13 (emphasis added). This statement flatly contradicts the Sixth Circuit's assumption that that issue already had been decided by the *Mohasco* footnotes. Moreover, statements in Justice Stewart's dissent, 101 S. Ct. at 507 n.2, and Justice Stevens's dissent, 101 S. Ct. at 508 n.1, similarly reveal

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here did not even meet that 240-day period. He delayed some 339 days before commencing state proceedings. In short, *Mohasco* not only dealt with critically different statutory schemes, it also dealt with a factual situation markedly different from that presented to the Sixth Circuit below.

that the issue of when a claimant is entitled to the extended 300-day filing period has not been resolved, even under Title VII.

The Court of Appeals for the Sixth Circuit conceded that *Ricks* "appears to contradict some of the language in *Mohasco* . . . ." More correctly, the statements in *Ricks* contradict the Sixth Circuit's own broad reading of *Mohasco*. Instead of retreating from their overreading of *Mohasco,* however, the Court of Appeals simply dismissed the importance of *Ricks,* with the cryptic statement that "this court is not convinced that the Supreme Court has now settled the issue in favor of [A & P] and in accord with our earlier decision."

The lower court's orders on remand manifest a serious confusion about the state of the law in this area. The Court of Appeals adhered to its broad reading of *Mohasco* and virtually ignored this Court's disavowal of that broad reading in *Ricks*.[17] This Court should, therefore, grant certiorari here to clarify the continuing confusion among the courts of appeals and to provide some guidance as to the proper resolution of this issue. In so doing, this Court will be able to decide this issue

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17. The First Circuit order on remand is similarly flawed and confused. *Ciccone v. Textron,* No. 791541 (1st Cir. January 19, 1981) (per curiam). Though the court apparently continued to believe that its original position was "the most reasonable and consistent interpretation" of the ADEA, they nonetheless felt compelled to reverse that decision in light of the *Mohasco* footnotes. Like the Sixth Circuit, the First Circuit based its remand decision solely on the *Mohasco* footnotes. They did not reconcile their broad reading of *Mohasco* with *Ricks,* nor did they discuss the rationale of their earlier decision, which was based on the structure, purpose and legislative history of the ADEA.

based on *all* the relevant considerations—especially the structure, policy and legislative history of the ADEA—rather than relying solely on dictum footnotes from an opinion construing another statute.

3. The holding of the Court of Appeals on remand is contrary to the structure, policy and legislative history of the ADEA, and is at odds with a prior decision of this Court.

When the ADEA timeliness issue presented here first arose in the courts of appeals, a consensus emerged holding that claimants in dual-law states were not entitled to the extended federal filing period of section 626(d)(2) unless they had filed state claims within the initial 180-day filing period of section 626(d)(1).[18] These holdings were based on the structure, policy and legislative history of the ADEA. All these courts of appeals have now abandoned their earlier position, solely because of this Court's statements in a Title VII case, *Mohasco Corp. v. Silver,* 447 U.S. —, 100 S. Ct. 2486 (1980). As explained in the preceding section, the lower courts clearly read *Mohasco* too broadly. Moreover, the structure policy and legislative history of the ADEA supply additional compelling reasons for this

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18. *Ciccone v. Textron, Inc.,* 616 F.2d 1216 (1st Cir. 1980); *Davis v. Calgon Corp.,* —— F.2d ——, 22 BNA FEP Cases 1761 (3d Cir. 1980); *Ewald v. Great Atl. & Pac. Tea Co., Inc.,* 620 F.2d 1183 (6th Cir. 1980). The Ninth Circuit had reached a contrary result in an earlier case. In that case, however, the question was a side issue in a large class action, it was neither briefed nor argued by the litigants and the court assumed California was an ADEA "deferral" state even though, unlike Title VII, there is no deferral under the ADEA. *Bean v. Crocker Nat'l Bank,* 600 F.2d 754 (9th Cir. 1979).

Court to grant certiorari and reinstate the earlier position of the courts of appeals.

First, the structure of the ADEA filing requirements indicates that "the only discernible reason" for the extended filing period in section 626(d)(2) "is to give the state an opportunity to conciliate the dispute"[19] and "to give the plaintiff a grace period within which to pursue state remedies before being compelled to institute a federal charge."[20] Thus, the original position of the courts of appeals, which required claimants to seek state relief at an early date, was entirely consistent with the structure of the ADEA. This structure, however, is not served by making the extended period available even to those who do not promptly pursue state remedies.

Second, at least two fundamental policies of the ADEA are violated by the Sixth Circuit's holding on remand.

Under the lower court's interpretation, plaintiffs in dual-law states are entitled to 300 days within which to file their age discrimination claims; claimants in federal-law-only states, however, must file within 180 days of the alleged discriminatory act. Claimants in dual-law states, therefore, receive an arbitrary 120-day "windfall" in which to pursue their claims. This disparate treatment between plaintiffs in dual-law and federal-law-only states is not only illogical but is in conflict with the policy of equal treatment that underlies the ADEA. Under the original position adopted by the courts of ap-

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19. *Ewald v. Great Atlantic & Pacific Tea Co., Inc.*, 620 F.2d at 1186.

20. *Ciccone v. Textron, Inc.*, 616 F.2d at 1220.

peals, however, the policy of equal treatment was furthered, because *all* plaintiffs were required to take some action on their claims within the initial 180-day period.[21]

The Court of Appeals holding on remand also ignores the overriding purpose of the ADEA filing requirements, which is "to protect the employer and any other prospective defendants from the necessity of defending stale claims."[22] The original position of the lower courts provided for some notice, in all cases, within 180 days of the alleged discriminatory act. The current holding, however, means that some claims will be as much as 300 days old when the prospective defendant first receives notice of the claim.

In this regard, this Court noted in *Oscar Mayer* that the rationale for the Congressional decision to permit concurrent filings under the ADEA, rather than the mandatory sequential filings of Title VII, was to avoid the delay occasioned by Title VII's sequential filing scheme and to permit more expedited processing of age claims.[23] The Sixth Circuit's current decision produces just the reverse result (*i.e.*, permits less diligence and more delay from an ADEA dual-law state claimant than

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21. *Ewald v. Great Atl. & Pac. Tea Co., Inc.*, 620 F.2d at 1186-87 (6th Cir. 1980). This Court has acknowledged that, even under Title VII's filing provisions,

> "[Neither a statutory] provision nor anything else in the legislative history contains any 'suggestion that complainants in some States were to be allowed to proceed with less diligence than those in other states.'" *Mohasco Corp. v. Silver*, 447 U.S. ——, 100 S. Ct. 2486, 2494 (1980).

22. *Ewald v. Great Atlantic & Pacific Tea Co.*, 621 F.2d at 1186.

23. *Oscar Mayer Corp. v. Evans*, 441 U.S. at 757.

from a Title VII deferral state claimant). Under the Sixth Circuit's current decision, an ADEA dual-law state complainant will automatically have 300 days to file his charge whereas Title VII deferral state complainants must file their charges within 240 days to insure timeliness, *Mohasco Corp. v. Silver, supra.* This result is entirely inconsistent with Congressional intent as discussed by this Court in *Oscar Mayer.*

In addition to undermining both the structure and policy of the ADEA, and conflicting with a prior decision of this Court, the holding of the Court of Appeals conflicts with the legislative history of the ADEA. As the First Circuit noted in its original opinion on this issue,[24] Congress intended that the extended 300-day federal filing period would be available as an accommodation *only* to those who voluntarily chose to file with the state *during the initial federal filing period.* According to the legislative history, the extended filing period would not be available to persons, like plaintiff in this case, who delayed more than 180 days before initiating any state proceeding:

> "[I]n the case of suits brought by individuals notice of intention to sue must be given the Secretary of Labor within 180 days after the alleged unlawful practice occurred, except that where action *has been commenced* under a State statute this period shall be *extended* to 300 days. (Emphasis added.) S. Rep. No. 723, 90th Cong., 1st Sess., *reprinted in* 113 Cong. Rec. 31251 (1967).
>
> [T]he notice to be filed by an individual who wishes to bring suit must be filed within 180 days of the

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24. *Ciccone v. Textron, Inc.,* 616 F.2d at 1220 n.8.

> occurrence of the alleged unlawful practice, except that where a State *has undertaken action* in accordance with its laws, an individual must file his notice within 300 days of the alleged unlawful practice." (Emphasis added.) S. Rep. No. 723, 90th Cong., 1st Sess., *reprinted in* 113 Cong. Rec. 31252 (1967). (Section by Section Analysis.)

In this case plaintiff had not begun state (or federal) proceedings within 180 days of his termination; hence to follow the language of Congress, no state "had undertaken action" or "commenced" proceedings "within 180 days after the alleged unlawful practice occurred." This legislative history shows that Congress intended the "extension' 'to depend upon action by the plaintiff within 180 days, not upon his state of residence.

In sum, the structure, policy and legislative history of the ADEA, and prior decision of this Court, provide strong justification for the original consensus position of the courts of appeals. The Sixth Circuit's failure to even consider these factors on remand should compel this Court to grant certiorari so that this important issue may be decided on its merits.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CIVIL ACTION NO. 76-10080

GILBERT EWALD,
Plaintiff,
v.
THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
Defendant.

Memorandum Opinion and Order

At a session of said court, held in the Federal Building, Bay City, Michigan on July 27, 1977

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This action is brought by plaintiff under the Age Discrimination in Employment Act of 1967 (ADEA), 29 USC 626(c), alleging that he was wrongfully terminated from employment with defendant at age 42 on account of his age. The action is before the Court on defendant's motion for summary judgment. The only issues raised are whether plaintiff failed to file a complaint with the Michigan Civil Rights Commission and to notify the Secretary of Labor of his intention to bring suit as required by 29 USC 626(d) and 633(b).

Section 626(d) of the ADEA requires a minimum of 60 days notice to the Secretary of Labor of an intent to bring suit prior to the commencement of an action. The section further provides that said notice must be filed within 180 days of the alleged discriminatory con-

duct except for cases to which section 633(b) applies. Under section 633(b), the notice to the Secretary must be filed within 300 days of the alleged discriminatory conduct. Section 633(b) also requires that 60 days have elapsed from the commencement of State enforcement proceedings before suit may be brought under the ADEA.

In this case, plaintiff has alleged and the parties have stipulated at the deposition of plaintiff that the Secretary of Labor was notified of the intention to bring suit on January 26, 1976, and that plaintiff filed a complaint with the Michigan Civil Rights Commission on March 25, 1976. The discriminatory conduct is alleged to have occurred on April 21, 1975.

It is defendant's position that this action is barred because plaintiff did not file the notice with the Secretary of Labor within the shorter notice period of Section 626(d) and that plaintiff is not entitled to the longer notice period of Section 633(b) because he did not timely file a complaint with the Michigan Civil Rights Commission. Defendant also asserts that the failure to timely file with the Michigan Civil Rights Commission acts to bar this action in and of itself.

This district has addressed these issues at great length. In *Magalotti v Ford Motor Co.,* 418 F Supp 430 (E.D. Mi., 1976) (J. Feikens), it was held that the failure to timely file a complaint with the Michigan Civil Rights Commission within the 90 day period allowed by MCLA 423.307(b)[1] did not act to bar the bringing of an action under the ADEA. The decision is consistent with the prior decision in *Bertsch v Ford Motor Co.,* 415 F

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f.n. 1. Repealed by P.A. 1976, No. 453, §804, effective March 31, 1977.

Supp 619 (E.D. Mi., 1976) (J. Pratt), where it was held that the failure to timely file with the Michigan Civil Rights Commission did not bar suit under the ADEA provided that the plaintiff filed the requisite notice with the Secretary of Labor within the shorter notice period of Section 626(d). By contrast, in *Gabriele v Chrysler Corp.*, 416 F Supp 666 (E.D. Mi., 1976) (J. Kennedy), it was held that the failure to timely file with the Michigan Civil Rights Commission acted to bar the commencement of an action under the ADEA. The Court finds it unnecessary to determine at this time which of these views should be followed, as from the face of the Complaint it is apparent that plaintiff neither timely filed with the Michigan Civil Rights Commission or timely notified the Secretary of Labor within the shorter period of Section 626(d). See also *Skoglund v Singer Co.*, 403 F Supp 797, 802-803 (D.N.H. 1973) and *Bonham v Dresser Industries Ind.*, 424 F Supp 891 (W.D.Pa., 1976).

At a more basic level, plaintiff asserts that he did timely file with the Michigan Civil Rights Commission because that each time defendant hires someone of a younger age than plaintiff a new act of discrimination occurs.

MCLA 423.303a(a), prior to its repeal by P.A. 1976, No. 453, §804 (effective March 31, 1977), provided that it was an unfair employment practice to discriminate against an individual, because the individual is between the ages of 18 and 60, "—with respect to hire, tenure, terms, conditions, or privileges of employment," MCLA 423.307(b) prior to repeal provided that:

> "Any individual claiming to be aggrieved by an alleged unlawful employment practice may—file

with the board, within 90 days after the alleged act of discrimination, a verified complaint—"

Both MCLA 423,303a(a) and 423.307(b) indicate that reference must be had to a particular discriminatory act affecting the individual which is concerned with the terms or conditions of his employment. The statute does not support a construction that a new grievance arises every time a practice is followed in accordance with a changed condition in employment. Rather, it is when the condition first changes which is crucial for purposes of when the time periods for bringing a complaint are commenced. See *Pompey v General Motors Corp.*, 385 Mich 537, 550 (1971).

Even if Michigan law would consider each instance of hiring of someone younger than plaintiff to be considered as a separate act of discrimination, for federal law it is the time of the act of discharge which is controlling. *Ott v Midland-Ross Corp.*, 523 F2d 1367, 1369 (CA 6, 1975); *Hiscott v General Electric Co.*, 521 F2d 632 (CA 6, 1975).[2] Likewise, the Complaint fails to allege the jurisdictional requirement of any notice to the Secretary of Labor concerning such possible later discriminatory acts. *Ott v Midland-Ross Corp.*, 523 F2d at 1370. Such later acts of discrimination also do not operate to toll the Michigan limitation as to any prior act. *Washington v Chrysler Corp.*, 68 Mich App 374, 380 (1976).

The final argument by plaintiff is that equitable considerations require that his failure to comply with

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f.n. 2. See also *United Airlines v Evans*, ... US ....., 45 LW 4566 (1977), in the context of Title VII, 42 USC 2000e, *et seq.*

the notice and filing provisions be excused. Reliance is placed on the allegation set forth in paragraph 12 of the Complaint that the United States Department of Labor advised plaintiff on June 21, 1976, that the requirements of section 626(d)(2) had been met. Without consideration of the actual purport of this notice or whether equitable considerations are relevant under the ADEA, the Court finds that it is sufficient to note that on June 21, 1976, the time period for both notice to the Secretary of Labor and for filing with the Michigan Civil Rights Commission had already expired.

For these reasons, the Court finds that this suit is barred. Defendants motion for summary judgment is GRANTED. Judgment shall be entered accordingly.

IT IS SO ORDERED

/s/ James Harvey
James Harvey
United States District Judge

APPENDIX B

No. 77-1600

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GILBERT EWALD,
Plaintiff-Appellant,
v.
THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 9, 1980.

Before: LIVELY, BROWN and JONES, Circuit Judges.

LIVELY, Circuit Judge, delivered the opinion of the Court in which BROWN, Circuit Judge, joined. JONES, Circuit Judge (pp. 10-12) delivered a separate dissenting opinion.

LIVELY, Circuit Judge. The issues in this case relate to time requirements contained in the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. (1976) (ADEA or the Act). The Act provides that before a civil action may be brought by an individual, the plaintiff must give the Secretary of Labor "not less than sixty days' notice of an intent to file such action."[1] The two subsections of § 626(d) following the quoted language then establish the time requirement for giving notice to the Secretary as follows:

Such notice shall be filed—

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1. ADEA § 7(d), 29 U.S.C. § 626(d).

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

ADEA § 7(d)(1), (2); 29 U.S.C. § 626 (d)(1), (2).

The Act also encourages settlement of claims of age discrimination in employment by conciliation at the state level. States which have a law prohibiting age discrimination in employment and an agency authorized to grant or seek relief from such discrimination are known as "deferral states." Though initial complaints and notices may be filed with a state agency and the U.S. Department of Labor simultaneously where a claimed act of discrimination occurs in a deferral state, no federal court action may be filed until the expiration of 60 days after proceedings have been commenced under the state law.[2] While the Supreme Court has held that the commencement of state proceedings is mandatory in deferral states, this step may be taken after a federal court action is begun and that action may be held in abeyance pending the outcome of state proceedings. *Oscar Mayer & Co. v. Evans,* 441 U.S. ....., 99 S.Ct. 2066, 2076 (1979).

Thus the scheme of the Act is to require resort to state procedures in deferral states, with the state agency having 60 days to effect conciliation before its efforts are superseded by court proceedings. Further, in cases from both deferral and non-deferral states the Secretary

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2. ADEA § 14(b), 29 U.S.C. § 633(b).

of Labor is given 60 days to attempt conciliation before an individual may seek relief in court.

I.

In the present case the plaintiff-appellant, Ewald, was terminated by the defendant-appellee, A&P, on April 21, 1975. Ewald was 42 years old and entitled to the protection of the Act. The alleged act of discrimination occurred in Michigan, a deferral state. *See Rucker v. Great Scott Supermarkets,* 528 F.2d 393 (6th Cir. 1976). On January 26, 1976 Ewald notified the Secretary of Labor of his intent to bring an action under ADEA. This was more than 180 days and less than 300 days after his termination. However, Ewald did not file a complaint with the Michigan Civil Rights Commission (MCRC) until March 25, 1976, 319 days after his termination. Plaintiff's counsel was advised that the MCRC could take no action on his complaint because it was filed more than 90 days after the alleged discriminatory act. *See* Michigan Compiled Laws §§ 433.301 et seq.

This action was filed in the district court on August 19, 1976. After discovery had been completed by the defendant it moved for summary judgment on the ground that the action was barred for failure of the plaintiff to pursue his state remedies in a timely manner and failure to notify the Secretary of Labor of his intentions to sue within 180 days. The plaintiff responded that he had not filed suit until more than 60 days after tendering a complaint to the MCRC and that his notice to the Secretary was given within the 300-day period provided for deferral states. Observance of these limits made his filing timely, he claimed. He also argued that there were equitable reasons for not requiring strict adherence to

the notice requirement. The district court granted the motion for summary judgment and dismissed the action upon finding that Ewald had not timely filed with the MCRC or notified the Secretary of Labor within the time limits established by § 626(d). The district court further found no basis for permitting a deviation from the requirements of the Act on equitable grounds.

II.

Though an ADEA claimant in a deferral state must commence an action under state law, his federal rights are not affected by a state provision which requires filing or notice within a period which is shorter than the 180-day notice period of § 626(d)(1). State limitations provisions "cannot govern the efficacy of the federal remedy." *Oscar Mayer & Co. v. Evans, supra,* 441 U.S. ....., 99 S.Ct. at 2074; *Gabriele v. Chrysler Corp.,* 573 F.2d 949, 956 (6th Cir. 1978) (concurring opinion), *vacated and remanded on other grounds,* ..... U.S. ....., 99 S.Ct. 2819 (1979); *Bonham v. Dresser Industries, Inc.,* 569 F.2d 187, 194 (3d Cir. 1977). Thus the fact that Ewald failed to file with the MCRC within 90 days was of no consequence. However, we must decide whether the fact that he neither commenced a state action nor notified the Secretary of Labor of his intent to bring suit within 180 days after his termination required dismissal of his action. The question is: Does the fact that an alleged violation of the Act occurred in a deferral state give the plaintiff 300 days in which to notify the Secretary of intent to sue, even though no state action is begun within 180 days of the occurrence?

The Ninth Circuit had this question before it in *Bean v. Crocker National Bank,* 600 F.2d 754 (1979),

and held that *Oscar Mayer, supra,* and the plain language of the Act compel the conclusion that "in a deferral state, an ADEA claimant may provide notice of intent to sue to the Secretary within 300 days of an alleged discriminatory act regardless of whether or not state proceedings have been timely commenced." 600 F.2d at 759. We respectfully decline to follow the *Bean* decision. As we read *Oscar Mayer,* it holds that a deferral state complainant may not ignore the state procedures and that failure to comply with a state requirement for commencing proceedings in a period shorter than 180 days does not bar a federal action. However, since the plaintiff in *Oscar Mayer* did notify the Secretary within 180 days, that case did not involve entitlement to the benefit of the extended notification period. One footnote statement in *Oscar Mayer* indicates that if this question had been before the Court it would have decided the matter as we do in this opinion.[3] Referring to the second basis of the *Bean* decision, a casual reading of the statute might lead one to the conclusion that a deferral state claimant has no duty to give notice or commence an action within 180 days. However, when the overall structure and scheme of the Act are considered, we find this conclusion untenable.

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3. 99 S.Ct. at 2976 n. 11.

In any event, even if the risk of bypass of state agencies were real, which it is not, States could readily avoid the possibility by extending their limitations periods to 180 days and by tolling their statutes of limitations upon the filing of a timely charge with the Department of Labor. See *Davis v. Valley Distributing Company, supra.* Cf. *Burnett v. New York Central Railroad,* 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965).

Congress appears to have concluded that 180 days is a reasonable time for an aggrieved party to determine that a claim under the ADEA exists. The only discernible reason for extending the notification period for a claim arising in a deferral state is to give the state an opportunity to conciliate the dispute. One purpose of the notice provisions of § 626(d) is to protect the employer and any other prospective defendants from the necessity of defending stale claims. The Secretary is required to notify prospective defendants "promptly" upon receiving notice of intent to sue. 29 U.S.C. § 626(d). The 300-day provision will not work to the detriment of prospective defendants if state proceedings are begun within 180 days because they will learn of the claims through the state agency which is seeking to conciliate them. However, if a deferral state plaintiff takes no steps during the 180-day period, the claim may be as much as 300 days old when the prospective defendants receive their first notice of it.

To require a deferral state plaintiff, within 180 days of the occurrence, either to commence state proceedings or to notify the Secretary of intent to sue would impose upon him the same basic time limit for initiating action as that imposed by the Act on a claimant in a non-deferral state. If he chooses to exhaust his state remedies before resorting to any federal procedure, a claimant may defer giving notice to the Secretary for as long as 300 days after the alleged discriminatory act. During that period the matter may be resolved through state efforts and no notice to the Secretary will be required. However, if the claimant fails to commence state proceedings within 180 days, he should be required to give the Secretary notice of intent to sue within that time. Otherwise, claimants in deferral states who make no

effort to use the state procedures would have 120 days longer to initiate an ADEA claim than those with identical claims in non-deferral states. The purpose of the extended period would not be served, and prospective defendants would be denied prompt notice of the impending action. Thus we agree with the district courts which have required claimants in deferral states either to commence state proceedings or to notify the Secretary within 180 days. *See Bertsch v. Ford Motor Co.*, 415 F.Supp. 619 (E.D. Mich. 1976); *Scoglund v. Singer Co.*, 403 F.Supp. 797 (D.N.H. 1975). The extended (300-day) period for notification of intent to sue is not available to a deferral state claimant who fails to commence state proceedings within 180 days after the alleged act of discrimination.*

III.

Having determined that Ewald was required by § 626(d) to notify the Secretary within 180 days of his intent to sue, we must determine next whether this is an absolute requirement or one which may be altered in cases justifying equitable relief. The exact nature of the time limits in § 626(d) has been a matter of some confusion for the courts. In *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975), this court held that the notice provision of § 626(d) is "jurisdictional." In *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976), and *Rucker v. Great Scott Supermarkets, supra,* the court termed the notice requirements of § 626(d) "jurisdictional," but noted that no facts were found in either

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*Since preparation of this opinion began, the First Circuit has reached the same conclusion in *Ciccone v. Textron, Inc.*, ... F.2d ..... (#79-1541, decided March 17, 1980), 48 U.S.L.W. 2635.

case to warrant equitable relief. This intimation that the requirements could be relaxed where equitable relief was warranted was a clear indication that the court did not consider the notice requirement to be jurisdictional in the strict sense. Judge McCree, dissenting in *Eklund* and concurring in *Rucker,* argued that § 626(d) created "statutory prerequisites" or "statutory preconditions," rather than jurisdictional requirements. 529 F.2d at 250-51 and 528 F.2d at 395. More recently this court has held that § 626(d) is not jurisdictional "in the sense that non-compliance deprives a district court of the power to hear the case." *Gabriele v. Chrysler Corp., supra,* 573 F.2d at 954-55 n. 15. This approach is in accord with the holding in *Dartt v. Shell Oil Co.,* 539 F.2d 1256 (10th Cir. 1976), *aff'd by equally divided Court,* 434 U.S. 99 (1977), that Congress did not intend for failure to file notice within the 180-day notice period to be an absolute bar to bringing an ADEA private action. 539 F.2d at 1259.

We believe § 626(d) contains both jurisdictional requirements and statutory prerequisites or preconditions. There appear to be two requirements which are truly jurisdictional in the sense that a district court may not entertain an ADEA action until they have been complied with: (1) Where a claim arises in a deferral state, no action may be maintained unless proceedings are at least commenced under the state law. *Oscar Mayer v. Evans, supra;* (2) Regardless of whether the claim arises in a deferral state or a non-deferral state, no action may be instituted "until the individual has given the Secretary not less than sixty days' notice of an intent to file such action." 29 U.S.C. § 626(d). Though § 626(d) uses "shall" in setting the time for giving the required notice to the Secretary, we construe the provisions of

§ 626(d)(1) and (2) as establishing periods of limitations rather than jurisdictional requirements. Thus we hold that commencing an action under state law in a deferral state and giving the Secretary at least 60 days notice are jurisdictional prerequisites, but that the time of filing this notice is not jurisdictional. A similar analysis of filing requirements under Title VII of the 1964 Civil Rights Act is found in *Reeb v. Economic Opportunity of Atlanta, Inc.*, 516 F.2d 924, 926 n.2 (5th Cir. 1975).

IV.

Since the provisions for the time of filing notice with the Secretary are analogous to statutes of limitations, they may be extended for equitable reasons. The district court in the present case discussed the plaintiff's claim that there were equitable considerations which warranted a relaxation of the 180-day notice requirement. The court found that the only fact relied upon by Ewald was the receipt of a letter from the Department of Labor dated June 21, 1976 advising that he had met the requirements of the ADEA with respect to 29 U.S.C. § 626(d)(2). Since this letter was received more than 14 months after Ewald's termination, he could not have relied upon it for his failure to give notice between 180 and 300 days after that event. In the absence of reliance, there is no basis for equitable estoppel.

Ewald maintains that the district court treated his claim of equitable considerations too narrowly. In his response to the defendant's motion for summary judgment, Ewald argued that he did not file suit until 60 days after tendering a complaint to the MCRC and thus had

fulfilled the only requirements of 29 U.S.C. § 633(b).[4] Having complied with the requirements of § 633(b), he contended, he was entitled to avail himself of the extended period provided by § 626(d)(2) for notifying the Secretary of his intent to sue. This was a purely legal argument and he presented no affidavit to establish the existence of a factual dispute. In his appellate brief Ewald states for the first time that he was advised by a letter of December 22, 1975 from the Department of Labor that an investigation was in progress regarding the termination practices of A&P. A pamphlet concerning ADEA was included with the letter, according to Ewald, and he then employed an attorney who sent the January 21, 1976 notification to the Secretary of Labor.

The December 22, 1975 letter is not in the record, and none of the facts surrounding it were presented to the district court. Before making its motion for summary judgment the defendant served interrogatories on the plaintiff and took his deposition. Ewald did not mention the earlier communications from the Department of Labor in his reply to interrogatories or during his deposition. On the record before the district court the

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4. ADEA § 14(b), 29 U.S.C. § 633(b), provides in pertinent part:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.

defendant was entitled to summary judgment. A motion for summary judgment requires the adverse party to make a response in which he "set[s] forth specific facts showing that there is a genuine issue for trial." Rule 56(e), Fed. R. Civ. P. The only fact mentioned by Ewald in his response was a reference to the letter of June 21, 1976. We agree with the district court that this letter, which had earlier been filed with replies to interrogatories, did not show the presence of a genuine issue for trial. The response to the summary judgment motion was primarily an argument for a construction of § 626(d) which both the district court and this court have now rejected. The district court did not err in holding that the plaintiff had presented no facts which would warrant relaxing the 180-day notice requirement on equitable grounds.

The judgment of the district court is affirmed.

JONES, Circuit Judge, dissenting.

Because I read the clear language of Section 626(d) of the Age Discrimination in Employment Act (ADEA) to grant the claimant who resides in a deferral state 300 days within which to file a charge with the Secretary of Labor after the alleged discriminatory act occurred, I respectfully dissent from Part II of the majority opinion. I concur in Parts I, III, and IV.

Section 626(d)(2) plainly provides that the notice to the Secretary "shall be filed . . . in a case to which Section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred . . . ." All agree that Michigan is a deferral state and Section 633(b) applies. The Supreme Court has declared that the time limitations of Section 626(d) stand apart from

any time restrictions found in Section 633(b). *Oscar Mayer Co. v. Evans,* 441 U.S. ....., 99 S.Ct. 2066, 2074 (1979). Therefore, a normal reading of the statute demonstrates that Ewald's claim is not time-barred. *Bean v. Crocker National Bank,* 600 F.2d 754 (9th Cir. 1979).

The reasoning of the majority is based on their conception of statutory purpose, not statutory language. The majority has in effect added language to the statute to preclude Ewald's claim. Because of the remedial purpose of the ADEA, procedural requirements not enacted by Congress should not be crafted by the court to bar claims. *Moses v. Falstaff Brewing Corp.,* 525 F.2d 92, 94 (8th Cir. 1975). I agree with the wisdom of Justice Blackmun's concurring statement that a remedial statute, such as ADEA, should be "liberally construed" in order to give "full recognition to that remedial character." 99 S.Ct. at 2076.

The majority concludes that "[t]he only discernible reason for extending the notification period for a claim arising in a deferral state is to give the state an opportunity to conciliate the dispute." Congress did not declare that purpose in either the statute or the legislative history. Such reasoning is only post-hoc judicial rationalization and should not prevail over clear statutory language. *Paxton v. Lanvin-Charles of The Ritz, Inc.,* 434 F.Supp. 612, 615 (S.D. N.Y. 1977). As said in *Paxton,* "[t]he fact that a state procedure for dealing with complaints exists is sufficient to justify congressional extension of the time within which a plaintiff must act on his complaint." *Id.* at 615.

The majority does not cite to any persuasive authority for its reasoning. The footnote in *Oscar Mayer & Co.* to which they cite is at best ambiguous and does not

address the issue before us. If anything, *Oscar Mayer & Co.* indicates that procedural requirements in ADEA should be liberally construed.

The legislative history of the 1967 enactment of ADEA is silent on the question before us. *See* 1967 U.S. Code Cong. & Ad. News 2213, 2218-19, 2224. Similarly, the legislative history of the 1978 amendments to ADEA does not reveal the majority's conceived purpose for the longer 300-day limitation in deferral states. The Senate Report describes Section 626 (d) in these terms:

> Section 7(d) of the act requires that an individual must give the Department of Labor notice of intent to file suit within 180 days after the alleged unlawful practice occurs. This period is extended to 300 days where the alleged unlawful practice occurs in a state which has an age discrimination statute which provides a remedy.

1978 U.S. Code, Cong. & Ad. News 504, 523-24. In short, the legislative history provides no support for the majority's interpretation of Section 626(d)(2).

The stated Congressional purpose of the notice requirement in Section 626(d) is "to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informed methods of conciliation." 1978 U.S. Code Cong. & Ad. News at 534. The majority's interpretation of the statute is not necessary to accomplish this purpose. A claim can hardly be labeled "old" after 300 days, when the statute of limitations for ADEA claims is two years.

The majority's conclusion engrafts a meaning to the statute which Congress did not place there. Unlike *United Steelworkers of America v. Weber,* 61 L.Ed. 2d 480, 488-89 (1979), a literal reading of the statute would not yield a result at variance with the purpose of the statute and the legislative history and historical context at the time of enactment do not compel a construction divergent from the plain meaning of the statute. Instead the majority's statutory drafting serves only to erect a procedural barrier which impedes the remedial goals of the statute. Absent a clear indication of Congressional intent justifying such a construction of the statute, I cannot agree.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 80-208

Gilbert Ewald,
Petitioner,
v.
The Great Atlantic & Pacific Tea Company, Inc.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Mohasco Corp.* v. *Silver,* 447 U.S. ..... (1980).

IT IS FURTHER ORDERED that the petitioner, Gilbert Ewald, recover from The Great Atlantic & Pacific Tea Company, Inc. Two Hundred Dollars ($200) for his costs herein expended.

October 20, 1980

Clerk's costs: $200.00

APPENDIX D

No. 77-1600

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GILBERT EWALD
Plaintiff-Appellant
v.
THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.
Defendant-Appellee

FILED
JAN. 6, 1981

JOHN P. HEHMAN, Clerk

Order

BEFORE: LIVELY, BROWN and JONES, Circuit Judges.

By order entered October 20, 1980, the Supreme Court vacated this court's judgment, *Ewald v. The Great Atlantic & Pacific Tea Company, Inc.* 620 F.2d 1183 (6th Cir. 1980), and remanded "for further consideration in light of *Mohasco Corp. v. Silver,* 447 U.S. ..... (1980)."

Upon further consideration the court concludes that its holding in Part II of *Ewald* that a claim in a deferral state must be filed with the state agency within 180 days of the occurrence complained of is inconsistent with the language in footnote 19 of the Supreme Court's opinion in *Mohasco Corp. v. Silver,* 447 U.S. at ....., 100 S.Ct. at 2491-2492, n. 19.

The judgment of the district court is reversed, and this cause is remanded to that court for further proceedings. The plaintiff-appellant will recover his costs on appeal.

ENTERED BY ORDER OF THE COURT

John A. Hehman
Clerk

Appendix E.

APPENDIX E

No. 77-1600

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GILBERT EWALD
Plaintiff-Appellant
v.
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Defendant-Appellee

FILED
FEB. 5, 1981

JOHN P. HEHMAN, Clerk

Order

BEFORE: LIVELY, BROWN and JONES, Circuit Judges.

The defendant-appellee has filed a petition for rehearing directed to this court's unpublished order of January 6, 1981 in which the judgment of the district court was reversed and the cause remanded to that court for further proceedings. The order of January 6, 1981 was entered by this court pursuant to a mandate from the Supreme Court of the United States which vacated this court's previous judgment in the case, 620 F.2d 1183, and remanded "for further consideration in light of *Mohasco Corp. v. Silver.*"

Following the remand this court carefully examined the opinion of the Supreme Court in *Mohasco Corp. v. Silver* and concluded that our holding in Part II of the

previous opinion of this court was inconsistent with language contained in a footnote to the opinion of the Supreme Court in *Mohasco Corp. v. Silver*. On this basis we reversed and remanded to the district court.

In its petition for rehearing the defendant-appellee requests us to reinstate our opinion and judgment entered upon the original submission of this appeal. It contends that the Supreme Court has used language in an opinion subsequent to *Mohasco Corp. v. Silver* which is inconsistent with the broad reading given to the Court's opinion in *Mohasco* and with this court's construction of that opinion on remand. *See Delaware State College v. Ricks,* ..... U.S. ....., 49 U.S.L.W. 4058 (Dec. 15, 1980). While it is true there is language in *Delaware State College v. Ricks* which appears to contradict some of the language in *Mohasco* this court is not convinced that the Supreme Court has now settled the issue in favor of defendant-appellee and in accord with our earlier decision.

In issuing the order of January 6, 1981 this court complied with the directions of the Supreme Court. We do not feel that we are free to withdraw the order of January 6, 1981 and reinstate our earlier decision on the basis of the arguments and citations contained in the petition for rehearing.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

No. 80-1566

APR 16 1981

ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
PETITIONER,

VS.

GILBERT EWALD, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a claimant residing in a Deferral State under ADEA have available to him the extended 300 day period for notification to sue to the Secretary of Labor as long as that claimant initiates state proceedings, regardless of whether those state proceedings are timely?

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STATEMENT OF CASE

Respondent had worked for the Great Atlantic & Pacific Tea Company between the years 1952 and April 21st, 1975 when he was terminated. Respondent notified the Department of Labor on January 26th, 1976 that he intended to file a civil action under the ADEA. He thereafter filed a complaint with the Michigan Civil Rights Commission pursuant to Michigan Compiled Laws Annotated, Section 423.303.

Respondent was notified on June 21st, 1976 by the Department of Labor that conciliatory action on their behalf had been unsuccessful and that he was free to bring a civil action against Petitioner under ADEA. A civil action was filed on August 19th, 1976 in the United States District Court for the Eastern District of Michigan, Northern Division, alleging age discrimination in violation of the ADEA. The District Court, prior to Respondent obtaining any discovery from Petitioner entered an order and opinion dated July 27th, 1977 granting Respondent's Motion for Summary Judgment holding the Respondent had not complied with the Notice requirements of ADEA.

It should be noted that a period of approximately four years and eight months has passed since Respondent initially filed his action for relief with the United States District Court for the Eastern District of Michigan, Northern Division. It has been approximately six years since Respondent was discharged from Petitioner Great Atlantic & Pacific Tea Company. The Complaint filed with the District Court has requested relief from alleged discriminatory practices of Petitioner. This matter has been before the Court of Appeals for the Sixth Circuit on two occasions and now is before the United States Supreme Court on a second occasion.

SUMMARY OF ARGUMENT

Petitioner presumes that this Court expected the Court of Appeals for the Sixth Circuit to go far beyond the decision in *Mohasco* v. *Silver*, 48 U.S.L.W. 4851 (June 29th, 1980) and to entertain extensive Briefs regarding the issue of whether or not the Respondent is entitled to the expanded 300 day filing period although this Court vacated the Sixth Circuit's previous Judgment with costs to Petitioner and although this Court instructed the Sixth Circuit Court of Appeals to consider the case in light of this Court's decision in *Mohasco*. Such a presumption is contrary to the obvious intent of this Court in *Mohasco*.

Petitioners further suggest that since *Mohasco* dealt with a Title VII case and not an ADEA case, the decision had no affect on interpretation of filing requirements under ADEA. This also is contrary to previous decisions of the Court. *Oscar Mayer & Co.* v. *Evans*, 99 S. Ct. 2066 (1979).

The suggestion that the decision of the Court of Appeals is against the structure policy and history of ADEA is in fact at odds with the prior decision of this Court as this Court has convincingly held in *Mohasco* that the legislation provides for a 300 day filing period in a state that has a law prohibiting age discrimination in employment and that the Act does not require that State proceedings must be filed within the time limit specified by State law.

ARGUMENT

I.

The Court of Appeals For The Sixth Circuit Did Fully Reconsider The Issues As Presented As Intended By This Court's Remand Order of October 20th, 1980

Although the Court of Appeals for the Sixth Circuit did not require and receive further briefing of the issues it should be

noted that they had the opportunity of extensive briefing of the issues prior to the Court's remand order based on *Mohasco Corporation* v. *Silver, supra* and they further had the benefit of the Court's well reasoned decision in *Mohasco*. Petitioner suggests that the Court of Appeals did not consider the legislative history of ADEA although the failure of the Court to specifically comment on that does not preclude an assumption that they considered all issues involved. The Petitioners make expansive presumptions in their argument which are totally unsupported by the record. The Court of Appeals is not required to explain in minute detail the reasons and grounds for their decision as long as their decision is supported by the record and is supported by the applicable law. Respondent argues that such conditions are certainly satisfied in the case at hand.

II.

The Lower Court Has Not Expanded The Interpretation of *Mohasco Corporation* v. *Silver* Beyond What Was Intended By This Court And Therefore No Clarification Is Necessary.

Petitioner argues that since *Mohasco* was not an ADEA case at all that a treatment of the notice requirements under the two pieces of legislation must be different. This Court has previously held in *Oscar Mayer Company* v. *Evans*, 99 S. Ct. 2066, 2071 (1979) that the interpretation of the notice requirements under ADEA and Title VII is identical. While the notice requirements are indentical there is a distinguishing feature in that there is no period of exclusive jurisdiction for the state to proceed under ADEA. All that is required under ADEA is that the State be allowed 60 days in which to act before civil litigation is commenced with the United States District Court. [See 29 U.S.C. Sec. 633(b).] Such a distinction though, does not preclude an interpretation of the time

periods for notification as being identical. Respondents would suggest that the logic in this Court's decision in *Mohasco & Oscar Mayer Company* was that this Court declined to preempt the legislative power of Congress by reading something into the notice requirements that just is not present.

Petitioners also cite the case of *Delaware State College* v. *Ricks*, __U.S.__, 101 S. Ct. 498 (1980) for the proposition that the issue has not been decided. While Petitioners object to the Court of Appeals relying on so-called dicta in the *Mohasco* case, they are themselves relying upon certain statements made in the *Ricks* case which they feel may indicate that the issue has not been decided. Respondent would argue that such a presumption goes far beyond the holding of this Court in *Ricks*, and supposes an illusory issue.

It appears as though Petitioner is requesting this Court to determine the factual issues regarding compliance with Notice requirements on a case by case basis despite the fact this Court has already set forth in its previous decisions the guidelines which should be applicable.

III.

The Holding Of The Court Of Appeals On Remand Is In Line With The Decision Of This Court And With The Structure, Policy And Legislative History of ADEA.

The Petitioner argues that the structure, policy and legislative history of ADEA is such that Respondents should not be entitled to the longer filing period and further argues that this has been the interpretation given by the Courts of Appeals in previous cases. They cite principally *Ciccone* v. *Textron, Inc.*, 616 F.2d 1216 (1st Cir. 1980); *Davis* v. *Calgon Corp.*, __F.2d__, 22 BNA FEP cases 1761 (3rd Cir. 1980); and the case at hand. What Petitioners failed to note though,

was that the policy, structure and history of ADEA has been set forth and argued in each of these Courts and that while the Courts of Appeals appear to have reached similar conclusions they were not always fully convinced of the correctness of their decision. In fact in the case at hand the original opinion issued in the Court of Appeals had a dissenting opinion by Circuit Judge Jones. Circuit Judge Jones felt that the legislative history of ADEA was silent on the question that was before that Court and is now before this Court.

The State in this case was allowed to perform its function, the Department of Labor was allowed to perform its function and the Defendant was not presented with a stale claim. Under all of the circumstances it appears that the policy of the ADEA has been clearly met. The statute is remedial and as such requires the type of interpretation that has been previously given by this Court.

It should further be noted that this Court in *Calgon Corporation* v. *Lawrence E. Davis*, File No. 80-529, the case cited by Petitioners in their Brief, denied a Petitioner for Rehearing on the Petition for Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit. The issue in that case was identical to the issue in this case and in fact the counsel representing the Petitioner in that case are from the firm that represents the Petitioner in the case at hand.

As the Statement of Facts point out, justice for Mr. Ewald has at this point been delayed for a period of approximately six years from the date of the alleged discriminatory act and for a period of approximately four years and eight months since suit was filed with the District Court. Respondent questions whether the delays and the costs that he's been forced to incur are necessary in light of decisions that clearly appear to be correct.

CONCLUSION

The Circuit Court's decision denying a Rehearing and interpreting this Court's decision in *Mohasco* as providing for an extended filing period is correct and that Petitioner for Writ of Certiorari should be denied.

Respectfully submitted,

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